90-285

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an employer has made a decision to partially close its business which is not subject to mandatory bargaining, does Section 8(a)(5) of the National Labor Relations Act require it to bargain over the consequent termination of the employees employed in the shutdown operation?

2. When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance?

PARTIES TO THE PROCEEDING*

The name of the only party to the proceeding in the Court of Appeals for the Ninth Circuit which is not listed in the caption of the case in this Court is:

Printing Specialties District
Council No. 2, as successor to
Printing Specialties District
Council No. 1

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* Litton Industries, Inc. is the parent corporation of the petitioner, Litton Financial Printing Division, a Division of Litton Business Systems, Inc.

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In The
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LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
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vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Litton Financial Printing Division, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 16, 1990.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals delivered below is reported at 893 F.2d 1128 (attached herein as Appendix A). The decision and order of the National Labor

Relations Board which the Court of Appeals reviewed are reported at 286 NLRB No. 79 (attached herein as Appendix B).

JURISDICTION

The judgment of the Court of Appeals was dated January 16, 1990 and entered on January 16, 1990 (attached herein as Appendix C). An order of the Court of Appeals denying a petition for rehearing and rejecting a suggestion for rehearing en banc was filed May 31, 1990 (attached herein as Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. §158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer —
>
> (5) to refuse to bargain collectively with the representatives of his employees . . . .

Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), provides in relevant part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the

> negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

STATEMENT OF THE CASE

1. Background

Petitioner ("Litton") operated a printing plant in Santa Clara, California, where the production employees were represented by the Printing Specialties District Council ("Union"). The last collective bargaining agreement between Litton and the Union expired October 5, 1979. Litton used two printing methods: cold-type and hot-type. For business reasons, Litton closed down its cold-type operation and laid off the ten employees working in that operation on August 29 and September 2, 1980. The Union attempted to grieve the layoffs, contending Litton had not followed seniority in selecting the employees to be laid off. Litton rejected the Union's attempt to grieve under an agreement which had expired some eleven months earlier but did offer to bargain over the effects of the layoffs. The Board's Regional Director issued an unfair labor practice complaint against Litton, alleging the Company had not bargained with the Union over its decision to lay off the ten employees and had refused to adhere to the grievance-arbitration provisions in the expired labor agreement.

2. Board Decision

The Board decided (Board Chairman Dotson dissenting), contrary to the Administrative Law Judge (ALJ), that Litton had an obligation to bargain with the Union regarding its decision to lay off the ten employees working in the shut-down, cold-type operation. The Board also found that Litton had engaged in a blanket refusal to grieve and arbitrate disputes in violation of Section 8(a)(5) of the Act, but, since the Union's grievances were not ones which arose under the expired agreement, the Board, contrary to the ALJ, held Litton had no obligation to arbitrate the grievances.

3. Court of Appeals Decision

The Court of Appeals, agreeing with the Board, held that Litton had an obligation to bargain with the Union regarding its decision to lay off the ten employees working in the cold-type operation which had been shut down and had violated Section 8(a)(5) of the Act by failing to bargain. The court held the Board's conclusion the layoff grievances did not arise under the expired collective bargaining agreement was unreasonable and reversed the Board's decision not to compel Litton to arbitrate those grievances, and remanded the cause "for further proceedings in accordance with this opinion." (App. A22)

4. Basis of Jurisdiction in Court of Appeals

The basis for jurisdiction in the Court of Appeals is Section 10(e) of the National Labor Relations Act. 29 U.S.C. §160(e).

ARGUMENT

1. Reasons for Granting the Writ

With respect to the decision of the Court of Appeals that Litton was obligated to bargain with the Union before it could lay off the employees working in the shut-down, cold-type operation, the Court of Appeals has decided a federal question in a way which is in conflict with the decision of this Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Further, petitioner submits the Court of Appeals has misapprehended *First National* by treating it as a decision to be applied on a case-by-case basis, which conflicts with a decision of the Court of Appeals for the Fourth Circuit, which holds that the decision in *First National* creates a per se rule. *Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988).

With respect to the decision of the Court of Appeals that Litton was obligated, under Section 8(a)(5) of the Act, to arbitrate a dispute with the Union over layoffs outside of seniority when the layoffs occurred almost one year after the expiration of the collective bargaining agreement, petitioner submits the Court of Appeals has expanded the holding of this Court in *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, CFL-CIO*, 430 U.S. 243 (1977), far beyond what was ever intended by this Court. In addition, the Court of Appeals has rendered a decision which is in conflict with the decisions of other Courts of Appeals on the same matter, as well as another decision of the Court of Appeals for the Ninth Circuit. *Local 703, International Brotherhood of Teamsters v. Kennecott Bros. Co.*, 771 F.2d 300 (7th Cir. 1985). *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d

1400 (8th Cir. 1986). *United Food & Commercial Workers International Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). *The O'Connor Company, Inc. v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983).

2. Litton's Decision to Lay Off Ten Employees Was Not a Subject of Mandatory Bargaining.

It is not disputed that Litton had no obligation to bargain with the Union over its decision to shut down its cold-type printing operations. The cold-type process produced printing of an inferior quality which resulted in the loss of a major customer. Cold-type printing was inefficient because it required more processing than hot-type printing. Litton operated other plants which used hot-type printing; therefore, if the Santa Clara plant converted solely to hot-type printing, work could be moved from plant to plant in an emergency. Training, research and development and equipment costs could be lowered if all Litton plants used the hot-type printing method. Clearly, the decision to convert the Santa Clara plant from a plant utilizing both cold- and hot-type printing into one utilizing solely the hot-type method was the type of decision insulated from mandatory bargaining by this Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

In *First National*, this Court held that a maintenance company's decision to terminate its service contract with one of its customers and discharge the employees who worked at that location, was not a subject of mandatory bargaining. The Court emphasized the employer's need for unencumbered decisionmaking, the need for certainty as to legal requirements, the availability to the Union of

"effects" bargaining, management's need for speed and flexibility and the inclination of unions to use bargaining as a tool for delay. In *First National*, both the majority and dissenting opinions stated the issue before the Court as one involving the termination of an operation *and* the discharge of the employees employed in that operation. 452 U.S. at 671 and 688. This Court specifically raised and rejected the argument that "had (the Union) been given an opportunity to talk, something might have been worked out to transfer these people to other parts of (the) business . . . ." 452 U.S. at 670. In the instant case, the Administrative Law Judge correctly applied the teaching of *First National* and concluded Litton had no obligation to bargain over the layoffs, stating:

> Thus, I further believe that both decisions (to eliminate the cold-type operation and lay off employees) were, and remain, inextricably intertwined, much as the employer's decisions, in *First National Maintenance, supra*, to partially close down and to terminate a crew were inseparable. (App. B9)

Board Chairman Dotson's dissent recognized the applicability of *First National*, stating:

> As the Supreme Court recognized in . . . *First National Maintenance* . . . certain management decisions may result in the loss of jobs and yet be outside the bargaining obligation. Indeed, as the Court stated in *First National Maintenance* . . .
>
> > Management must be free from the constraints of the bargaining process to the extent essential for

> the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. [Footnote omitted.]
>
> My colleagues have ignored these dictates. To require (Litton) to bargain over the layoff, which was part and parcel of its decision to convert its machinery, would severely undermine (Litton's) 'need for unencumbered decisionmaking.' (App. B26-27)

The practical effect of the decision of the Court below is to render the opinion of Justice Blackmun in *First National* meaningless, for it means nothing to an employer to say, "Yes, you may decide to shut down an operation, but you cannot lay off the employees in that operation until you have bargained with the Union." The requirement to bargain over laying off employees working in a closed-down operation destroys the certainty, speed and flexibility which an employer needs to

run its business and leaves the employer at the mercy of a union bent on delay. The breadth of the alternatives available for bargaining relied upon by the Court below points up the absurdity of requiring bargaining over the layoffs (App. A11). Because of the difficulty in scheduling bargaining sessions and the union's right to reams of information relevant to those alternatives, a union which always remained willing to talk could drag negotiations on for months.

Litton submits the holding of this Court in *First National* established a "per se" rule that the partial closing of a business and consequent layoff of employees working in that part of the business shut down does not require bargaining. In *Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988), the Court of Appeals for the Fourth Circuit noted "a majority of commentators, including those who harshly criticize the *First National Maintenance* result, agree that the decision established a *per se* rule that an employer has no duty to bargain over a decision to close part of the business." 853 F.2d at 227. This is necessarily so if this Court's objectives in *First National* are to be obtained. If the Board and a Court of Appeals can treat each partial closing and consequent termination of employees on a case-by-case basis, no employer will ever be able to proceed with a partial closing and consequent terminations free from the fear that ten years later, as in the instant case, a court may find it has committed an unfair labor practice. This possibility hardly comports with what this Court had in mind when it spoke of management's need for certainty, speed and flexibility and recognized a union's ability to prolong negotiations. Indeed, this case is the horror story which this Court sought to avoid in *First National* when it said, "Management . . . also must have some degree of

certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice . . . ." 452 U.S. at 679. By separating the decision to shut down an operation from the consequent termination of the employees working in that operation and subjecting the layoffs to collective bargaining, the Court below has nullified *First National*. The petition should be granted.

3. There Is No Obligation Under Section 8(a)(5) of the National Labor Relations Act to Arbitrate Seniority Grievances Based Upon Facts Which Occur Long After Contract Expiration.

In *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, CFL-CIO*, 430 U.S. 243 (1977), the Court (Stewart and Rehnquist dissenting) held that a presumption existed favoring arbitrability where there was a dispute over a provision in an expired agreement, which presumption could be negated expressly or by clear implication. In *Nolde Bros.*, the dispute involved severance pay provided for in an expired contract. The dispute arose four days after contract expiration, and the Court limited its holding by stating ". . . we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." 430 U.S. at 256, n. 8.

In the instant case, the no-strike clause in the expired agreement (Section 20, entitled "Strikes-Lockouts") specifically provided, ". . . the Union and its members, individually and collectively, agree that there shall be no

strikes, boycotts, sitdowns, stoppages of work or any other forms of interference with production or other operations on the part of the employees during the term of this Agreement." (App. A4) Thus the Court below has failed to confine *Nolde Bros.* within its limits, for the Union's reservation of the right to strike after "the term of this Agreement" clearly negates any presumption the parties intended to arbitrate post-expiration disputes. As the dissent in *Nolde Bros.* points out:

> And the Union's termination of the contract, thereby releasing it from its obligation not to strike, foreclosed any reason for implying a continuing duty on the part of the employer to arbitrate as a quid pro quo for the Union's offsetting, enforceable duty to negotiate rather than strike. (Citation omitted.)

It is contrary to *Nolde Bros.* that the Union in the instant case can be relieved of its contractual obligation not to strike upon the contract's expiration but the Company must arbitrate grievances which are based on facts which occur eleven months after the contract has expired.

Nolde Bros. involved Section 301(a), 29 U.S.C. §185(a) of the Labor Management Relations Act, 1947.[1] In 1985, in another Section 301(a) suit, the Court of Appeals for the Seventh Circuit declined to order the

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[1] Section 301(a) provides: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

arbitration of a post-contract termination dispute "because we believe that *Nolde* is distinguishable on other grounds: the length of time between expiration of the contract and the events triggering the grievance." *Local 703, International Brotherhood of Teamsters v. Kennecott Bros. Co.*, 771 F.2d 300 at 303 (7th Cir. 1985). The Court reasoned that the *Nolde Bros.* presumption favoring arbitration weakens as time passes; otherwise, parties could be bound to arbitration for years or even decades after the expiration of a contract. In *Kennecott*, six months passed between expiration date and grievance events. In 1986, the Court of Appeals for the Eighth Circuit decided *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir. 1986), another Section 301(a) suit, where the union sought to compel arbitration under an expired agreement even though the event triggering the grievance arose more than a year after contract expiration. The court, in part, based its decision on the passage of time, stating, "Moreover, the passage of more than one year between the expiration of the contract and the employees' discharge also makes application of the *Nolde* presumption of doubtful propriety." 795 F.2d at 1404. In 1983, the Court of Appeals for the Ninth Circuit decided *The O'Connor Company, Inc. v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983). The court specifically noted the contract expired June 15, 1980 and the grievance concerned a complaint arising on March 31, 1981. The court stated:

> The Union contends that even though the collective bargaining agreement had terminated, the obligation to arbitrate continued, even as to matters occurring after termination of the agreement.

* * *

> The question now before the court is whether the Company in this case had a continuing obligation to arbitrate grievances which arose after the expiration of the collective bargaining agreement. This question must be answered in the negative.

* * *

> The Union's position in this case is untenable because the labor dispute involved here arose following termination of the old contract and was not covered by that contract. 702 F.2d at 824-825.

On March 1, 1990, the Court of Appeals for the Tenth Circuit decided a case directly in conflict with the decision of the court below. *United Food & Commercial Workers International Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). In *Gold Star*, the court analyzed several grievance disputes which arose months after contract expiration and found they were not arbitrable because they did not "arise under" the collective bargaining agreement. Two of the grievances involved violation of seniority rights conferred by the expired agreement. The court stated:

> Two of the grievances involve violations of seniority rights conferred by the old contract. The courts unanimously hold that '(s)eniority is not only born from the collective bargaining agreement; it does not exist apart from that contract.' *Cooper v. General Motors Corp.*, 651 F.2d 249,

> 251 (5th Cir., Unit A, 1981) (citing cases) . . . . Therefore, none of the disputes in these cases are subject to compulsory arbitration under the expired agreement. 897 F.2d at 1026.

In the case below, the court reversed the Board's decision not to compel Litton to arbitrate the layoff-out-of-seniority grievances because it disagreed with the Board's conclusion the grievances did not "arise under" the expired collective bargaining agreement. (App. A22)[2]

Petitioner submits the court below has stretched *Nolde Bros.* beyond its limits for another reason. *Nolde Bros.* involved a suit brought under Section 301(a) of the Labor Management Relations Act, which appears to be the proper legal avenue for testing whether or not a post-expiration dispute is arbitrable. But the instant case involves an allegation Litton violated Section 8(a)(5) of the National Labor Relations Act. Section 8(d) of the Act very specifically defines an employer's obligation under Section 8(a)(5). It seems pure fiction to hold that a refusal to arbitrate a dispute based on facts transpiring almost one year after contract expiration is the same thing as refusing (in the words of Section 8(d)) ". . . to meet at reasonable times and confer in good faith with

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[2] In reality, the provision in Litton's expired collective bargaining agreement did not provide for layoffs on the basis of strict seniority. Rather, under the expired agreement, ". . . in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." In a case decided by the Board subsequent to its decision in the instant case, which specifically distinguished the *Litton Case*, the Board explained that considerations of aptitude and ability preclude arbitration because aptitude and ability do not "arise under" a contract. *United Chrome Products, Inc.*, 288 NLRB No. 130 (1988).

respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of written contract incorporating any agreement reached if requested by either party . . . ." Litton's refusal to allow a third person to decide a dispute between Litton and the Union clearly is not a refusal to meet with the Union at reasonable times and confer in good faith.

CONCLUSION

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), Justice Blackmun authored an opinion for the Court which established a very important point of law for the business community: that an employer could partially close its business and terminate the employees working in that part of the business without going through the time-consuming process of negotiating with a union. This case is important to employers because it enables them to act with speed and flexibility and free from the uncertainty of legal challenges to its actions which might not be resolved for years (over 10 years in the instant case). The court below has undone all that by separating management's action into two decisions, one not bargainable but the other subject to all of the delays and uncertainties attendant to collective bargaining. But, as the ALJ concluded in this case over eight and one-half years ago, the decisions to shut down an operation and lay off employees are too closely related to separate if *First National* is to have any meaning at all. In effect, the court below has reversed *First National* in the Ninth Circuit, and the petition for certiorari should be granted.

The petition should also be granted with respect to the decision of the court below on the arbitration issue.

Unlike here, *Nolde Bros.* did not involve Section 8(a)(5). *Nolde Bros.* involved an "accrued" right, severance pay. Unlike here, *Nolde Bros.* was a case where only four days had passed between contract expiration and dispute, and the *Nolde Bros.* Court expressly limited its decision to cases where there was a short span between contract expiration and dispute. There is a difference of opinion between circuits on the role which the passage of time plays when a party seeks to arbitrate a post-expiration dispute. There is a difference of opinion between the circuits with respect to whether seniority arises under a contract. The arbitration issue is one which arises often and is a source of considerable litigation, as evidenced by the cases which have reached the Board and the Court of Appeals level.[3]

The petition should be granted.

Respectfully submitted,

M. J. DIEDERICH

Counsel of Record
for Petitioner

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[3] See, in addition to the cases above, *Seafarers International Union v. National Maritime Services*, 820 F.2d 148 (5th Cir. 1987) and *Federal Metals Corp. v. United Steelworkers of America (AFL-CIO)*, 648 F.2d 856 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981).

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner-Intervenor, v. LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., Respondent.	No. 88-7065 NLRB No. 32-CA-3160
PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 88-7079 NLRB No. 32-CA-3160 OPINION

Application for Enforcement and
Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted
January 11, 1989 — San Francisco, California
Filed January 16, 1990

Before: Jerome Farris, Robert Boochever and
Cynthia Holcomb Hall, Circuit Judges.
Opinion by Judge Hall

OPINION

HALL, Circuit Judge:

In No. 88-7065, the National Labor Relations Board ("NLRB" or "the Board") seeks enforcement of an order it issued against employer Litton Financial Printing Division ("Litton") on November 6, 1987. In No. 88-7079, Printing Specialties District Council Number 2 ("the Union"), petitions this court for review of the same Board order. The instant dispute arose in 1980 when Litton decided to close down the "cold-type" printing operation in its Santa Clara, California, plant, to expand its more efficient "hot-type" operation in the same plant, and to lay off ten employees who had worked primarily on "cold-type" equipment. At that time, the last of a series of collective bargaining agreements ("CBAs") had expired and Litton was refusing to recognize or bargain with the Union.

In the proceedings below, the Board found that Litton violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act") by refusing to bargain over the layoffs, by directly dealing with the laid-off employees over severance pay, by refusing to accept or process grievances filed to protest the layoffs as violative of seniority rights, and by effectuating a wholesale repudiation of its obligations under the contractual grievance-arbitration provisions. To remedy these unfair labor practices, the Board issued a "cease and desist" and limited backpay order. The Board also ordered Litton to process the layoff grievances through the first two steps of the grievance-arbitration procedure, to bargain over the layoff decision, and to post

appropriate notices. The Board declined, however, to order Litton to arbitrate the layoff grievances.

On appeal, Litton argues: (1) that the layoff was not a mandatory subject of bargaining, and that it had fulfilled its statutory obligation to bargain over the "effects" of the layoff decision; (2) that the grievance-arbitration provisions of the CBA expired in October of 1979 along with the contract or, at a minimum, had become ineffective by the time the grievances were filed almost a year later; (3) that the Board erred in finding a wholesale repudiation by Litton of its obligations under the grievance-arbitration process contained in the expired CBA.

In its appeal, the Union argues that the Board erred in its interpretation of section 8(a)(5) by relying on case law under section 301 of the Act, 29 U.S.C. § 185, to hold that the layoff grievances in this case are not encompassed within Litton's duty to arbitrate post-expiration grievances that "arise under" the expired CBA. The Union further maintains that the correct legal framework for analyzing an employer's refusal to process and arbitrate post-expiration or hiatus grievances is under the case law holding that an employer violates section 8(a)(5) by imposing a unilateral change in a term or condition of employment, *i.e.*, a "mandatory subject of bargaining," without bargaining to impasse. Accordingly, the Union seeks reversal of the Board's order insofar as it declined to compel arbitration of the layoff grievances.

I

Most of the facts relevant to decision of this appeal are undisputed or were found by an administrative law judge ("ALJ") in a hearing held on March 19, 1981. The

employer in this case, Litton Financial Printing Division, is a division of Litton Business Systems, Inc., in the business of printing bank checks. Printing Specialties District Council Number 2 is the successor to the exclusive bargaining representative for the production and maintenance employees at Litton's plant in Santa Clara, California, the only one of six Litton printing facilities involved in this case. Beginning in 1974, Litton and the Union were parties to successive CBAs. The last such contract expired on October 5, 1979.[1]

Prior to August 1980, Litton used both cold-type and hot-type printing processes at its Santa Clara plant; its other five plants used only the hot-type process. In July 1980, Litton decided to convert the Santa Clara facility

[1] Sections 19 and 21 of the expired CBA contained a three-step grievance-arbitration procedure which provided:

> "Differences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement shall be determined by arbitration in the manner hereinafter set forth [in section 21]."

In a rather unusual provision, section 21 goes on to describe the three steps of the grievance-arbitration procedures, but also contains its own "no-strike clause" which provides that "there shall be no suspension or interruption of work on account of [an employee grievance as to the interpretation or application of the terms of this Agreement] . . . ." There is a general "no-strike clause" in section 20 that is expressly limited to "the term of this Agreement."

With respect to layoffs, the CBA provided that:

> "Whenever [the] Employer intends to lay off all or part of his employees, he shall give notice of such intention no later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal."

to an entirely hot-type operation after one of its major customers, Wells Fargo Bank, canceled 30 per cent of its cold-type print orders. A Litton representative testified that this decision was based on four factors: (1) the loss of the Wells Fargo and other customer orders; (2) the greater economy of the hot-type process by which more checks could be printed on a single sheet of paper; (3) the increased flexibility to have other Litton plants take over the Santa Clara plant's work in emergencies; (4) the reduction in training, research and development, and equipment costs. To accomplish the planned conversion, Litton transferred some of its cold-type work to other plants, sold some of its cold-type equipment, and acquired additional hot-type equipment.

The instant dispute arose on August 29 and September 2, 1980, when Litton laid off ten of the 42 workers in the Santa Clara plant bargaining unit. Seven of the laid-off employees had worked exclusively on cold-type equipment; the other three had worked primarily, but not exclusively, on cold-type equipment. The layoffs were uncontrovertedly effectuated without notice to the Union, and were not in accordance with seniority. In fact, six of the eleven most senior employees in the Santa Clara bargaining unit were among those laid off. Litton dealt directly with the individual laid-off employees to give them severance pay without giving notice to or bargaining with the Union over that issue.[2]

[2] No exceptions were filed by Litton to the ALJ's finding that this direct dealing violated section 8(a)(1) and 8(a)(5) of the NLRA. Litton's failure to contest this finding in its brief, constitutes a waiver. *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir. 1981). The portion of the Board's order based on this finding is entitled to summary enforcement under section 10(e) of the Act. 29 U.S.C. § 160(e).

The affected employees notified the Union of the layoffs; the Union, in turn, filed separate but identical grievances for each one alleging "unjust layoff . . . out of seniority." By letter dated September 24, 1980, the Union's business agent notified Litton that the grievances had been filed by the shop steward, and requested that the employer meet with Union representatives to discuss the layoff and its impact on the senior employees who were dismissed. The Union also requested that the laid-off employees be reinstated pending resolution of the grievances. In a letter dated November 10, 1980, the Union reiterated its demand to utilize the grievance-arbitration procedures and bargain about "both the decision to layoff the workers and the effects upon those employees," and requested relevant information.

Litton refused to process the layoff grievances, maintaining that it had no obligation to do so because the CBA containing the grievance and arbitration procedures had expired. Although it expressed a willingness to bargain over the "effects" of the layoffs, Litton has consistently refused to bargain over the "decision" to lay off the ten employees.

On these facts, a majority of the Board panel found, in agreement with the ALJ, that Litton was obligated to continue processing grievances during the hiatus period under its expired agreement. The Board also ruled that Litton's refusal to do so constituted a wholesale repudiation of its contractual obligations under the grievance and arbitration provisions of the expired contract and was, therefore, a violation of sections 8(a)(5) and 8(a)(1) of the Act.

The Board also decided, contrary to the ALJ, that Litton's obligation to bargain about the effects on unit employees of its decision to convert its Santa Clara operation from cold-type to hot-type processes included

a duty to bargain about its decision to lay off the ten employees. The Board, therefore, concluded that Litton's refusal to bargain upon demand by the Union over these mandatory subjects of bargaining was a further violation of sections 8(a)(5) and 8(a)(1) of the Act.

In its order, the NLRB required Litton to cease and desist from engaging in the unfair labor practices found. The Board also ordered Litton, upon the Union's request to: (1) process the layoff grievances under the first two steps of the grievance procedure found in the expired CBA; (2) bargain with the Union over the layoffs as effects of its decision to convert to a hot-type operation; (3) pay backpay to the ten laid-off employees in accordance with *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968), *on remand from* 380 F.2d 933 (9th Cir. 1967); and (4) post appropriate notices. The Board and the Union jointly seek enforcement of the Board's order as heretofore described.

In the portion of its order challenged by the Union, the Board declined to order Litton to arbitrate the layoff grievances. The Board asserted that these grievances, which were based on conduct occurring after the CBA expired, did not "arise under" the contract and that Litton, therefore, had no legal or contractual obligation to arbitrate them.

II

In general, an order of the National Labor Relations Board must be enforced if the Board correctly applied the law, and if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole. *Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1143 n. 1 (9th Cir.

1988); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1384-85 (9th Cir. 1984).

III

Sections 8(a)(5) and 8(d) of the National Labor Relations Act require an employer to bargain with its employees' exclusive bargaining representative over "terms or conditions of employment." 29 U.S.C. §§ 158(a)(5) and 158(d). Congress has assigned to the NLRB the primary task of interpreting these provisions. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). Because the classification of bargaining subjects for purposes of section 8(d) of the Act is " 'a matter concerning which the Board has special expertise,' " an NLRB conclusion that a matter is a mandatory subject of bargaining within the meaning of section 8(d) is entitled to considerable deference. *Id.* (quoting *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965)); *see also NLRB v. Financial Institution Employees of America Local 112*, 475 U.S. 192, 202 (1986) (recognizing the Board's broad authority to interpret provisions of the Act and the courts' traditional deference to Board constructions that are not irrational or inconsistent with the Act).

This court should not, moreover, reject a reasonably defensible construction by the Board of section 8(d) merely because we would prefer a different view of the statutory provision. *Ford Motor Co.*, 441 U.S. at 497. Such a construction must be upheld unless the proper legal standard was not applied, or the Board failed to give the plain language of the standard its ordinary meaning, or the Board's interpretation is fundamentally inconsistent with the structure of the Act and an attempt to usurp major policy decisions properly made by Congress, or the Board has moved into a new area of regulation which Congress has not committed to it. *Id.*

[1] The Supreme Court has held that the language of section 8(d) "plainly cover[s] termination of employment." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964). In particular, layoffs have consistently been held to be a mandatory subject of bargaining, and unilateral layoffs by employers violate section 8(a)(5). *Local 512, Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705, 710-11 (9th Cir. 1986). *See also NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 204 (10th Cir. 1982); *Gulf States Manufacturers, Inc.*, 261 N.L.R.B. 852, 853, 864 (1982), *enf'd in pertinent part*, 704 F.2d 1390, 1395-99 (5th Cir. 1983). Litton argues, however, that there is no duty to bargain about layoffs that are "closely related to" or "naturally follow" from a management decision that is not itself a mandatory bargaining subject. Litton acknowledges only a duty to bargain over the "effects" of such layoffs, and contends that it has always been and remains willing to meet with the Union to discuss that issue.

[2] Litton was not required to bargain with the Union about its economically-motivated decision to convert from cold-type printing to a hot-type process in its Santa Clara plant. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981). The Court in *First National Maintenance* squarely faced and rejected an argument that such a management decision to shut down part of a business was a mandatory subject of bargaining. It reasoned that the harm that was likely to the employer's need of freedom to decide whether to shut down part of its business, purely for economic reasons, outweighed the incremental benefit that might have been gained through the union's participation in making the decision. *Id. Cf., Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 215 (management decision to replace employees in existing bargaining unit with those of independent

contractor to do the same work under similar conditions is a mandatory subject of bargaining).

[3] Just as clearly, however, Litton was required to bargain with the Union in this case over the "effects" of its decision to discontinue its cold-type printing operation. The Court in *First National Maintenance* repeatedly emphasized that it was not disturbing case law embodying the well-established principle that employers are required, as part of the "effects" bargaining mandated by section 8(a)(5), to bargain in a meaningful manner and at a meaningful time about "matters of job security" that arise in connection with a partial closing. 452 U.S. at 677-78 n. 15; *id.* at 681-82 (citing *NLRB v. Royal Plating & Polising Co.*, 350 F.2d 191, 196 (3d Cir. 1965), and *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966)).[3] In fact, the Court declared in a footnote,

[3] At this point in its opinion, the Court in *First National Maintenance* seemed to be including " 'termination of employment which . . . necessarily results' from closing an operation" within the scope of mandatory "effects" bargaining over "matters of job security." 452 U.S. at 681 (quoting *Fibreboard*, 379 U.S. at 210). A very narrow reading of *First National Maintenance* would be that only the precise decision to terminate its contract with Greenpark was nonbargainable, and that the Court meant to require the employer to bargain about discharging employees who had worked at the Greenpark facility. As Litton observes, such a narrow reading of *First National Maintenance* approaches absurdity.

The Court almost certainly viewed the two decisions, in the circumstances of that case, as one and the same. For example, the Court stated that the case before it concerned a "management decision . . . that had a direct impact on employment, since jobs were *inexorably eliminated* by the termination" of part of the employer's business operations. 452 U.S. at 677 (emphasis added). The Court also distinguished the employer's "decision to terminate its Greenpark service operation and its consequent discharge of the employees" from "the effects of the termination." 452 U.S. at 671.

(continued)

"There is no doubt that petitioner [First National Maintenance] was under a duty to bargain about the results or effects of its decision [to close down part of its business], or that it violated that duty." 452 U.S. at 679 n. 15.

[4] The question for decision here then is whether the Board could reasonably conclude, after *First National Maintenance*, that a layoff following a conversion or partial-closing decision, such as the one involved in this case, is a mandatory subject of bargaining as an "effect" of the nonbargainable management decision. In this case, unlike *First National Maintenance*, the termination of employees by layoff was not the inevitable consequence of the underlying management decision. Litton had numerous, and admittedly feasible, alternatives[4] that it could have explored with the Union to avoid or reduce the scope of the layoff without having to

(ftn. continued)

A better reading of *First National Maintenance* is that on the facts presented to the Court — *i.e.*, that the employer contracted to provide its customers with maintenance services, hired personnel separately for each customer, and did not transfer employees between locations — the decision to terminate the contract with a particular customer, the Greenpark nursing home, was essentially identical to the decision to terminate its employees who had provided Greenpark with maintenance services. The only meaningful "effects" bargaining required in such a case would be over matters such as severance pay. *See* 452 U.S. at 677-68 [*sic.*] n. 15.

[4] The Board recognized the following alternatives that Litton could have pursued: retraining the "cold-type" employees to work on the new hot-type equipment; transferring the displaced senior employees to its other plants or other positions within the same plant; going to a shortened workweek, or employing a system of rotating layoffs, to divide the remaining work among all the employees. All of these alternative courses of action would have been consistent with the decision to convert to a "hot-type" printing operation, and could have been discussed without calling into question the underlying management decision.

reconsider its conversion decision. Litton suggests no reason other than labor costs for preferring the layoff over any of the suggested alternative courses of action; to the extent the layoff was motivated by a desire to reduce labor costs, it was amenable to bargaining. *First National Maintenance,* 452 U.S. at 680. While not dispositive, these facts distinguish the instant case from the situation in *First National Maintenance* and support the Board's conclusion.

[5] There was, moreover, no evidence that Litton's decision was, or had to be, made with any extraordinary speed, flexibility, or secrecy, or that bargaining about the layoff would have impeded any other important business interest recognized by the Court in *First National Maintenance.* 452 U.S. at 682-83. In these circumstances, the benefit to labor-management relations of such bargaining almost certainly outweighed the burden it would have imposed on the conduct of Litton's business.

[6] The Board reasonably concluded that the layoff at issue in this appeal was a mandatory subject of bargaining as an "effect" of the nonbargainable decision to convert from cold-type to exclusively hot-type printing. Accordingly, we will enforce the Board's order to the extent it found Litton's refusal to bargain about the layoff decision to be a violation of sections 8(a)(5) and 8(a)(1), and sought to remedy this unfair labor practice.

In addition to asserting both a "due process"[5] and a "waiver"[6] defense to the charge that its refusal to

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[5] There is no merit in Litton's argument that the Board's finding of a section 8(a)(5) violation under a theory different from the one alleged in the complaint constitutes a denial of due process. The Board found that Litton committed an unfair labor practice "by failing to bargain with the Union over the . . . layoffs as effects of its decision to convert . . . to an exclusively hot-type operation." This conduct was almost precisely the same as the conduct alleged to be unlawful in paragraph 14(b) of the General Counsel's complaint, to wit, "Since . . . October 3, 1980, . . . [Litton] has failed and refused to bargain with the Union . . . with respect to [its] decision to lay off the [ten named] individuals . . . ." Paragraph 15 of the complaint alleged that this conduct constituted a violation of the employer's duty to bargain in good faith under sections 8(a)(5) and (1) of the Act.

The complaint, moreover, was in compliance with the Board's Rules and Regulations, which require "a clear and concise description of the acts which are claimed to constitute unfair labor practices." *See* 29 C.F.R. § 102.15(b). The complaint specified the "act" — a refusal to bargain about the decision to lay off employees — which was claimed, and ultimately found, to be an unfair labor practice.

Finally, as the Board convincingly demonstrates, the theory under which the Board ultimately found a violation of the Act — *i.e.*, that the layoff decision was a mandatory subject of bargaining as a separable effect of the nonbargainable conversion decision — was fully litigated before the Board. The Board properly found that the complaint put Litton on notice of the issues to be litigated, and was more than adequate to satisfy due process requirements.

[6] Litton's argument that the Union, either by contract or conduct, "waived" its right to bargain over the layoffs in this case is meritless. In general, a contractual waiver of the right to bargain about a mandatory subject of bargaining must be in clear and unmistakable language. *American Distributing Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). There is simply no such language in the parties' expired CBA. Contractual silence on the Union's right to bargain about layoffs, moreover, cannot be construed as a waiver. *See NLRB v. Southern California Edison Co.*,

(continued)

bargain over the layoffs violated sections 8(a)(5) and 8(a)(1), Litton argues that it in fact fulfilled any bargaining obligations by offering to discuss "the effects of the layoff." Despite two requests by the Union to meet and discuss *both* the layoffs and their effects, Litton offered in its letter of November 3, 1980, only to bargain over the "effects of the layoffs." The evidence in the record supports the Board's finding that Litton "was not willing to bargain over the layoff as such."

IV

[7] We turn next to the question whether the Board reasonably concluded that an employer's general repudiation of its obligation to arbitrate post-expiration grievances that "arise under" the expired CBA constitutes a violation of sections 8(a)(5). The NLRB has held, in reliance on *Nolde Bros. v. Local No. 358, Bakery & Confectonary Workers Union*, 430 U.S. 243

(ftn. continued)
646 F.2d 1352, 1366 (9th Cir. 1981).

The fact that, on a few occasions in the past, Litton had laid off small numbers of employees without bargaining is also insufficient to show "waiver by inaction." To establish such a defense, Litton was required to show that the Union had clear notice of its intentions sufficiently in advance of any actual layoff to allow a reasonable opportunity to bargain. *American Distributing Co.*, 715 F.2d at 450.

Finally, even if the Union had waived its right to bargain about previous layoffs by not protesting them, it would not have thereby waived its right to bargain about the more extensive layoffs here. *See NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969) (a right once waived is not lost forever; each time the bargainable event occurs the Union has the election of requesting negotiations or not). Whatever the Union might have done with respect to prior layoffs, it unequivocally requested bargaining as to this particular layoff.

(1977),[7] that a general repudiation of a binding contractual obligation to arbitrate grievances arising after expiration of a collective bargaining agreement violates an employer's duty to bargain under secton 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). *Indiana & Michigan Electric Co.*, 284 NLRB No. 7, 1986-87 NLRB Dec. (CCH) ¶ 18,748 (May 29, 1987).

[8] Under *Indiana & Michigan*, an employer must approach hiatus grievances on an *ad hoc* basis, distinguishing those that are arbitrable under *Nolde* from those that are not. *UPPCO, Inc.*, 288 NLRB No. 98, 1987-88

[7] *Nolde* was an action under "section 301," 29 U.S.C. § 185, to compel an employer to arbitrate a severance pay dispute that arose when, during post-expiration negotiations, the employer informed the union that it was closing its plant in response to the union's strike threat. The Court held that termination of a CBA does not automatically extinguish a party's contractual obligation to arbitrate grievances arising under the contract. 430 U.S. at 250-51. Noting that termination of the CBA "would have little impact on many of the considerations behind [the parties'] decision to resolve their contractual differences through arbitration." 430 U.S. at 254, and that there was a strong presumption of arbitrability of disputes over the meaning and effect of collective-bargaining agreements, the Court concluded:

> "The parties must be deemed to have been conscious of this policy when they agree[d] to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication."

430 U.S. at 255.

NLRB Dec. (CCH) ¶ 19,405 (May 12, 1988). Only those grievances that "arise under" the CBA are presumptively arbitrable. *Indiana & Michigan*, 1986-87 NLRB Dec. (CCH) at ¶ 32,054. A dispute based on post-expiration events "arises under" the CBA, under the Board's view, only if it "concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceabie after the contract expires." *Id.*

In this appeal, the Union has launched a broad-based attack on the fundamentals of the Board's *Indiana & Michigan* decision.[8] Basically, the Union contends that

[8] As the Board recognizes, Litton does not challenge the general principles of *Indiana & Michigan*. Litton instead contends that it was not obligated to arbitrate the layoff grievances because of language in the CBA which states that "the stipulations set forth shall be in effect for the time hereinafter specified." Litton argues that, under this general provision, the arbitration clause expired along with the rest of the contractual terms on October 5, 1979. It was clearly reasonable for the Board to conclude that this general expiration clause did not "expressly or by clear implication" negate the strong *Nolde* presumption of post-expiration survival of the contractual obligation to arbitrate. 430 U.S. at 255. Like the Board, the courts have consistently held that general language concerning the duration of the contract is not sufficient to show that the arbitration clause expires with the contract; there must be specific language limiting the arbitrability of post-expiration disputes. *See, e.g., Seafarer's v. National Marine Services, Inc.*, 820 F.2d 148, 154 (5th Cir.), *cert. denied*, 108 S.Ct. 346 (1987); *Local 703, Int'l Bhd. Teamsters v. Kennicott Bros.*, 771 F.2d 300, 303 (7th Cir. 1985); *Steelworkers v. Fort Pitt Steel Casting Division-Conval-Penn, Inc.*, 635 F.2d 1071, 1075-76 (3rd Cir. 1980), *cert. denied*, 451 U.S. 985 (1981).

We also reject Litton's contention that it had no obligation to arbitrate any post-expiration grievances because of the passage of time between the expiration of the CBA and the filing of the layoff grievances. Litton relies on *Kennicott*, 771 F.2d at 303, and dicta in *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T.*, (continued)

the Board, in *Indiana v Michigan*, has perpetuated a long-standing error in its analysis of unfair labor practice charges brought to remedy an employer's refusal to arbitrate post-expiration grievances. Rather than relying on section 301 precedent such as *Nolde*, the Union maintains that the Board should be analyzing such charges under the "unilateral change doctrine" of *NLRB v. Katz*, 369 U.S. 736 (1962). *See also Stone Boatyard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981).

In essence, the *Katz* doctrine is that an employer who fails to maintain the status quo with respect to "terms and conditions of employment" after a CBA expires, and imposes unilateral changes in a mandatory subject of bargaining before bargaining to agreement or impasse over the relevant term or condition of employment, commits an unfair labor practice — a refusal to bargain — in violation of section 8(a)(5). Because an arbitration procedure is incontrovertibly a mandatory subject of bargaining, *see Indiana & Michigan*, 1986-87 NLRB Dec. (CCH) at ¶ 32,051, the Union maintains that an employer who unilaterally abandons a pre-existing arbitration procedure during the post-expiration or hiatus period is guilty of a refusal to bargain under *Katz*.

The parties have vigorously debated the soundness of the *Indiana & Michigan* approach to the duty to arbitrate post-expiration grievances. However, because the Board

(ftn. continued)
Inc., 795 F.2d 1400, 1404 (8th Cir.), *cert. denied*, 479 U.S. 1007 (1986), to support this argument. Although the Ninth Circuit has decided a case in which the grievance for which the union sought arbitration occurred nearly a year after the CBA expired, *O'Connor Co. v. Carpenters Local 1408*, 702 F.2d 824 (9th Cir. 1983), in no way did the court indicate that the post-expiration passage of time played any role in its decision to deny arbitration. *See id.* at 825.

erred in concluding that the layoff grievances in this case were not arbitrable, on the ground that they did not "arise under" the expired CBA, we decline the parties' invitation to resolve their dispute over *Indiana & Michigan*. For purposes of this appeal, we assume without deciding that the Board's *Indiana & Michigan* decision is a reasonably defensible construction of the section 8(a)(5) duty to bargain.

V

The Board concluded that the grievances in this case, which alleged unjust layoff in violation of seniority rights, did not "arise under" the collective bargaining agreement. The Board found that the particular grievances at issue in this case did not involve "a right worked for or accumulated over time," and that there was no indication that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." The Board, accordingly, declined to order Litton to arbitrate the layoff grievances.

The Board contends that this decision was an exercise of its remedial discretion. We believe, however, that the Board's determination that Litton had no obligation to arbitrate the layoff grievances is a matter of statutory or contractual interpretation, rather than a remedial decision. Therefore, its decision must be upheld if "reasonably defensible," *Ford Motor Co.*, 441 U.S. at 497 (statutory interpretation), or if it is reasonable and not inconsistent with the Act's policies. *NLRB v. Southern California Edison Co.*, 646 F.2d 1352 (9th Cir. 1981) (contract interpretation). We find that the Board's decision was unreasonable and inconsistent both with its own decisions and with the Act's policies as interpreted by this Circuit and the Supreme Court.

The Board and the courts have had considerable difficulty trying to develop a coherent set of principles for determining when a grievance "arises under" the CBA such that an employer has a duty — under *Nolde* for purposes of section 301 actions, and now under *Indiana & Michigan* for purposes of unfair labor practice proceedings — to arbitrate a post-expiration grievance. The Board's current view is that an employer has no obligation to arbitrate a particular grievance based on post-expiration events *unless* it involves contract rights "capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Indiana & Michigan*, 1986-87 NLRB Dec. (CCH) at ¶ 32,054.

[9] Somewhat surprisingly, the Board concluded that the grievances in this case, which alleged that Litton laid off ten employees in violation of seniority rights guaranteed by a particular provision in the CBA, did not "arise under" the contract. The Board must have been looking only at the event (the layoff) that sparked the dispute, and not at the substantive contract-based rights (seniority protection against layoff) that were allegedly violated.

[10] Since the Board handed down its Decision and Order in the instant case, it has decided at least two other cases that conflict with its "arising under" conclusion in the instant case. *United Chrome Products, Inc.*, 288 NLRB No. 130, 1987-88 NLRB Dec. (CCH) ¶ 19,436 (May 1, 1988) (dispute arising out of the application of seniority arises under the expired agreement, and is subject to mandatory arbitration, because seniority rights were worked for and accumulated over time and arguably remained enforceable after the contract expired); *UPPCO, Inc.*, 288 NLRB No. 98 (1988) (employer required to arbitrate request concerning

seniority because it arose under the contract and contract did not expressly provide for expiration of the seniority provisions upon expiration of the CBA).[9] Both of these cases mitigate in favor of reversing the Board's decision not to compel Litton to arbitrate the grievances at issue in this case.

[11] There is a further conflict between the Board's standard in *Indiana & Michigan*, and the standard applied in this Circuit in section 301 actions to determine when a grievance "arises under" the expired CBA so as to create a duty to arbitrate. Recently this court rejected an argument that only grievances based on " 'rights undeniably *accruing* under [the] contract *prior to termination*' are covered by the post-termination duty to arbitrate." *Local Jt. Exec. Bd. of Las Vegas Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 796 F.2d 1159, 1163 (9th Cir. 1986) (emphasis in original), *cert. denied*, 479 U.S. 1033 (1987).[10] In *Royal Center*

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[9] In his brief and at oral argument, the General Counsel's representative attempted to distinguish the Board's *UPPCO* and *United Chrome Products* cases saying that the seniority provision at issue in the instant case is not absolute. Rather, he asserted, a Litton employee enjoys seniority protection against layoff only "if other things such as aptitude and ability are equal." This is not a distinction made by the Board, and we do not know whether the Board would impose such a distinction. *See Local Union No. 2338, Int'l Bhd. Electrical Workers v. NLRB*, 499 F.2d 542, 544 (D.C. Cir. 1974) ("reasons for Board action are to be supplied by the Board, and not by counsel as its surrogate"); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87-89 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

In the absence of a Board decision explaining why consideration of "aptitude and ability" prevent arbitrability, we refuse to make such a distinction.

[10] The *Royal Center* court also observed, in passing, that the Supreme Court has referred to arbitration a dispute over contractual seniority rights. *See Piano & Musical Instrument Workers, Local* (continued)

we construed much more expansively the *Nolde* presumption of arbitrability of post-expiration grievances; rather than focusing on a narrow concept such as "accrual," the court centered its analysis on *"preserving the original intent of the parties"* as to whether a particular type of grievance would have been arbitrable if circumstances unanticipated by the parties when the agreement was drafted had not arisen. 796 F.2d at 1163 (emphasis in original).

The *Royal Center* approach is consistent with that of other Ninth Circuit cases. *See George Day Construction Co. v. United Bhd. of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471, 1478 (9th Cir. 1984) (observing, in dicta, that post-expiration grievances are arbitrable if union can point clearly to a contractual provision that it claims was violated by the employer); *O'Connor v. Carpenters Local Union No. 1408*, 702 F.2d 824, 825 (9th Cir. 1983) (employer had no duty to arbitrate post-termination grievance because parties had not agreed that it would be subject to arbitration after expiration of the CBA, and because the dispute "was not covered by [the] contract").

The *Royal Center* analysis is also consistent with that of *Nolde* itself. In *Nolde*, the Supreme Court did not directly rely on the accruability of the right asserted in concluding that the severance pay grievance at issue in that case was arbitrable. Instead, the Court viewed the grievance as "arising under" the expired contract because it "hinge[d] on the interpretation ultimately given the contract clause." 430 U.S. at 249. Indeed, the *Nolde* Court held that "where the dispute is *over a provision of the expired agreement*, the presumptions favoring

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(ftn. continued)
2549 v. W.W. Kimball Co., 333 F.2d 761 (7th Cir.), *rev'd per curiam*, 379 U.S. 357 (1964).

arbitrability must be negated expressly or by clear implication." *Id.* at 255 (emphasis added).

[12] Because of the conflicts within the Board's own cases in applying its test for determining when a post-expiration grievance "arises under" the CBA so as to give rise to a duty to arbitrate, and between the Board and Ninth Circuit precedent on the same issue, we hold that the Board's conclusion that the layoff grievance in this case did not "arise under" the CBA is unreasonable and must be reversed.

VI

The Board reasonably concluded that the layoff was a mandatory subject of bargaining and that Litton, therefore, violated sections 8(a)(5) and 8(a)(1) by refusing to bargain about the layoff decision. To this extent, the Board's order will be ENFORCED.

The Board's conclusion that Litton had neither a statutory nor a contractual obligation to arbitrate post-expiration grievances alleging unjust layoffs "out of seniority," however, is inconsistent with Supreme Court, Ninth Circuit, and its own recent case law. Accordingly, the portion of the Board's order by which it declined to order arbitration of the layoff grievances is REVERSED, and the cause REMANDED for further proceedings in accordance with this opinion.

APPENDIX B

286 NLRB No. 79

DBS
D-4832
Santa Clara, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 32-CA-3160

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS
SYSTEMS, INC.

and

PRINTING SPECIALTIES AND PAPER
PRODUCTS UNION, DISTRICT COUNCIL
NO. 1, INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION

DECISION AND ORDER

On 4 September 1981 Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and supporting briefs,[1] and the Respondent filed an answering brief.

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[1] On the following dates the Board received letters from counsel for the parties calling the Board's attention to various cases: 9 August 1982 (the Charging Party); 8 November 1982 (the Charging Party); 18 July 1983 (the Respondent); 7 January 1986 (the Respondent). The Respondent has requested that the letter received 9 August 1982 from counsel for the Charging Party be stricken from the record. This request is denied.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[3]

The judge concluded that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to bargain over a decision to lay off certain employees in August and September 1980 without bargaining with the Union. We reverse this dismissal for the reasons set forth below. The judge did find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to process pursuant to the grievance and arbitration procedure set forth in its expired collective-bargaining agreement certain employee grievanes filed over the layoff. We agree with the judge that the Respondent's conduct in failing and refusing to process the grievances violated Section 8(a)(5), but we do so for the following reasons.[4]

The Respondent and the Union were parties to collective-bargaining agreements covering the produc-

[2] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Charging Party has excepted to the judge's refusal to award attorney's fees. We conclude that the defenses that the Respondent has raised are debatable rather than frivolous, and we find that an award of such expenses is unwarranted. *Heck's Inc.*, 215 NLRB 765 (1974); *Tiidee Products*, 194 NLRB 1234 (1972).

[4] The judge also found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by dealing directly with employees by granting severance pay benefits to laid-off employees without prior notice to or consultation with the Union. The parties have not excepted to this finding.

tion and maintenance employees at the Respondent's facility in Santa Clara, California, since 1974. At the time of the events recounted here, the parties were operating without a contract, their last agreement having expired on 5 October 1979. That expired contract required the parties to arbitrate "differences that may arise between the parties hereto regarding this Agreement and any violation of the Agreement, and the construction to be placed on any clause or clauses of the Agreement." Moreover, that contract's introductory section specified that the "stipulations set forth shall be in effect for the time hereinafter specified." Prior to August, 1980,[5] the Santa Clara plant was the only one of the Respondent's facilities at which both cold- and hot-type printing processes were employed, all of its other plants using only the hot-type process. In July the Respondent decided to discontinue its cold-type printing process and to convert the Santa Clara plant to an entirely hot-type operation. Four factors motivated the Respondent's decision: dissatisfaction with the cold-type process' product and a consequent loss of orders, including the loss of 30 percent of the cold-type business of one of its largest customers; the greater economy of the hot-type format; the expectation that in an emergency the Respondent's other hot-type plants would be able to do the Santa Clara plant's work; and the expectation that a strictly hot-type operation would reduce training and equipment costs. Pursuant to this decision, the Respondent transferred cold-type work to its other plants and began to acquire additional hot-type equipment and to sell its cold-type equipment. On 29 August and 2 September the Respondent laid off 10 of the plant's 42 unit employees, 7 of whom had worked exclusively on the cold-type equipment and 3 of whom

[5] Unless otherwise noted, all dates refer to 1980.

had worked primarily on it. Although the expired agreement required the Respondent to afford the Union certain notice of layoffs and provided that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal," the Union received no advance notice of the layoffs and the employees were not laid off in accord with their seniority.

The affected employees notified the Union of the layoffs, whereupon individual grievances were filed for each laid-off employee under the expired agreement, charging "unjust layoff . . . out of seniority." Union Business Agent Marilyn Major testified that the Respondent refused to accept the grievances. On 24 September Major wrote the Respondent's plant manager, Mary Arnold, that the grievances had been filed and requested both a meeting with the Respondent "to discuss this layoff and its impact on these senior people" and reinstatement of the laid-off employees pending resolution of the matter. As the judge found, the Respondent admitted that it failed and refused, and continues to fail and refuse, to process the employee grievances pursuant to the grievance and arbitration procedure in the expired contract. On 3 November the Respondent's counsel reiterated to Major in pertinent part:

> Your letter of September 24 . . . appears to me to be ambiguous. When I first replied to it on October 3, I viewed it as a request to utilize the grievance-arbitration provisions of the expired contract.
>
> Upon reading it again, I can see where you might have also been requesting a meeting to discuss the effects of the layoffs mentioned in your letter. If that was your intent, I have no objection to such a meeting. Please call me if you wanted to arrange such a discussion.

On 10 November the Union's attorney renewed its request for bargaining over both the decision to lay off the employees and the effects. Since then, the Respondent, although expressing its willingness to bargain over the "effects" of the layoffs, has refused to bargain over the "decision" to lay off the employees, and the parties have not bargained over either subject.

1. As noted above, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to process the layoff grievances pursuant to the grievance-arbitration clause in the expired collective-bargaining agreement. Board law has long held that the unilateral abandonment of a contractual grievance procedure upon expiration of the contract violates Section 8(a)(5) of the Act. See, e.g., *Bethlehem Steel Co.*, 136 NLRB 1500, 1503 (1962), enfd. in pertinent part 320 F.2d 615 (3d Cir. 1963). Therefore, the Respondent was obligated to continue to process grievances during the hiatus period under its expired agreement, and we find that by failing and refusing to accept the layoff grievances, the Respondent violated Section 8(a)(5) of the Act.

In the recently decided *Indiana & Michigan Electric Co.*, 284 NLRB No. 7 (May 29, 1987), we reaffirmed our conclusion in *Hilton-Davis Chemical Co.*, 185 NLRB 241 (1970), that "the arbitration commitment arises solely from mutual consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate." *Indiana & Michigan Electric*, supra, 284 NLRB No. 7, slip op. at 13. Instead, we concluded that if a party to a collective-bargaining agreement retains a legally enforceable obligation to arbitrate grievances originating after

expiration, that obligation must originate in the expired agreement. Id., slip op. at 17-18. In *Indiana & Michigan Electric* we found that the expired contract in that case contained a broad arbitration clause, without language sufficient to overcome the presumption that the obligation to arbitrate imposed by the contract extended to disputes arising under the contract and occurring after the contract had expired. Thus, the respondent remained "subject to a potentially viable contractual commitment to arbitrate even after the contracts expired," id. at 19, a commitment that it repudiated in violation of Section 8(a)(5) of the Act by an across-the-board written policy expressing a general intention not to process any grievances and routine refusals to process grievances or arbitrate postexpiration disputes.

In the case at hand, we find that the language of the collective-bargaining agreement subjected the Respondent to the same "potentially viable contractual commitment to arbitrate" postexpiration grievances. First, the expired agreement imposes a broad arbitration requirement on the parties. Second, the judge correctly found that the language of the expired agreement does not negate "expressly or by clear implication" the presumptions favoring the arbitration of grievances arising under the expired contract but occurring after it expired. *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243, 255 (1977). The language quoted above, giving the contract's stipulations effect for "the time herein specified," is not sufficient to rebut the *Nolde* presumption of arbitrability because it does not reveal the parties' intentions "as to the pertinent issue, which is, whether the arbitration clause *survives* expiration and, if so, which post-contract grievances are arbitrable." *Teamsters Local 703 v. Kennicott Bros. Co.*, 771 F.2d 300, 303 (7th Cir. 1985) (emphasis in original). In *Indiana & Michigan Electric* itself, relying on parallel

contractual language in *Nolde*, we found that the *Nolde* presumption was not rebutted by a termination clause which read: "In the event of termination of this agreement as herein provided, it shall cease to have binding effect, and the terms and conditions herein may be altered, modified, or terminated without notice." 284 NLRB No. 7, slip op. at 19, fn. 5.

Moreover, we find that, like the respondent in *Indiana & Michigan Electric*, the Respondent, by the course of conduct described above, repudiated its contractual obligation to arbitrate by its refusal to arbitrate the grievances presented to it by the Union. As noted above, the Respondent has admitted that it failed and refused to process the 10 grievances discussed here "pursuant to the grievance and arbitration procedure in the *expired* contract" (emphasis added). In view of this admission and its 3 November letter to Major, noted above, we conclude that the Respondent's conduct "amounted to a wholesale repudiation of its contractual obligation to arbitrate." *Indiana & Michigan Electric*, supra, slip op. at 20 (citations omitted). In concluding that the Respondent's conduct fell short of a repudiation of its contractual obligation to arbitrate, our dissenting colleague fails to note the Respondent's admission and the clear implication of its 3 November letter. He also cites *Dallas Morning News*, 285 NLRB No. 106 (Sept. 16, 1987), in concluding that the Respondent's course of conduct did not establish a "wholesale repudiation" of the arbitration procedure. We find *Dallas Morning News* factually distinguishable from the instant case. In *Dallas Morning News*, the union wrote the Federal Mediation and Conciliation Service requesting it to appoint a panel of arbitrators to resolve a grievance over the layoff of two employees. After receiving a copy of this letter, the respondent's agent replied to the union, "I believe there is no basis for your letter requesting a panel of

arbitrators, and I consider it to be of no force or effect as far as The News is concerned." The Board found the evidence "ambiguous insofar as the issue of an undifferentiated blanket refusal is concerned." It found that the respondent's letter did not identify reasons for its "no basis" assertion, and did not refer to grievance or arbitration requests other than the union's letter. The Board also referenced the respondent's brief to the judge and the argument made there, which it apparently concluded did not raise a wholesale repudiation argument, and found that the evidence concerning the respondent's original reply was not inconsistent with the position in its brief. It thus concluded that it could not "say that a preponderance of the record evidence weighs in favor of finding the kind of wholesale repudiation of the arbitration procedure" that was found in *Indiana & Michigan Electric*. Id., slip op. at 3. By contrast, here, the Respondent's admission, the language of its 3 November letter, and also its brief to the Board (which argues, e.g., that the parties' contract establishes that "the parties clearly indicated that they did not intend the arbitration provision to survive the term of the contract") are all consistent with a conclusion that the Respondent's refusal to process the grievances through the grievance-arbitration procedure amounted to a "wholesale repudiation" under *Indiana & Michigan Electric*. We also note that in *Indiana & Michigan Electric*, as here, none of the individual grievances at issue were found to "arise under" the expired contract within the meaning of *Nolde*. Therefore, contrary to the implication of the dissent, the Board's ultimate determination of arbitrability for remedial purposes does not defeat the finding of a violation where the respondent's generalized refusal to arbitrate is based on the expiration of the contract rather than the arbitrability of specific grievances. Accordingly, we find that the Respondent violated Section

8(a)(5) and (1) of the Act.[6]

2. The General Counsel and the Union have excepted to the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the decision to lay off the 10 unit employees. The judge found that the decision was "inextricably intertwined" with the decision to convert the plant's machinery, which he found was not a mandatory subject of bargaining under *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). While the General Counsel does not contend that the decision to convert the plant's machinery was a mandatory subject of bargaining, she does contend that the layoffs were subject to mandatory bargaining as an effect of the decision to convert the plant's machinery. We find merit in this exception under the facts of this case. Both *First National Maintenance*, supra, and *Otis Elevator Co.*, 269 NLRB 891 (1984), reaffirm that employers are obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain. Under the facts of this case, it is clear that the Respondent's decision to lay off employees is not so inextricably intertwined with the conversion decision as to render impossible bargaining over the layoff decision, as distinct from the conversion decision,

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[6] The Respondent also appears to argue that the grievances involved in this case are not arbitrable because the layoffs occurred nearly 1 year after the contract expired. Compare *Nolde*, supra, 430 U.S. at 255 fn. 8; *Teamsters Local 238 v. C.R.S.T.*, 795 F.2d 1400, 1404 (8th Cir. 1986); *Teamsters Local 703 v. Kennicott Bros.*, supra, 771 F.2d 300, 303. In view of our finding here that the grievances did not arise under the expired collective-bargaining agreement, we find it unnecessary to determine whether time alone, without reference to the nature of the grievance, is sufficient to overcome the presumption of arbitrability.

as the judge believed it to be. In concluding otherwise, the judge stated that:

> It is not mere speculation that the Union's arguments against, and suggestions in place of, layoffs would be countered by Respondent's insistence that such action was necessary and that any alternative would not be cost effective. These arguments would undoubtedly, despite the Union's protestations to the contrary, call into question the rationale underlying the plant conversion plan itself.

JD sec. III, B, 3.

We disagree with the judge that the course of bargaining would inevitably lead to questioning the decision to convert the plant. Laying off 10 employees is not the inevitable or, as our dissenting colleague would have it, the "natural" outcome of the conversion decision. It is one of a number of responses to changed circumstances, e.g., the 10 employees could have been retrained to work the hot-type equipment or transfered [*sic*] to other plants or positions within the Santa Clara plant. Moreover, 3 of the 10 employees laid off had not worked exclusively on the cold-type machinery; surely their layoff was not an inevitable or a "natural" consequence of the decision to convert the plant's operations. Plainly, then, the judge's forecast of fruitless negotiations will not support a finding that the layoff and conversion decision were inseparable for bargaining purposes.

The nature of the layoff in this case was as the General Counsel contends: it was an effect of the conversion decision and, accordingly, the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union over it. *Morco*

Industries, 279 NLRB No. 100, slip op. at 4 (Apr. 30, 1986). Although the Respondent was willing to bargain over the effects of the layoff, it was not willing to bargain over the layoff as such. We emphasize that the Respondent has not excepted to the judge's finding that it failed and refused to bargain over the decision to lay off.[7]

Our dissenting colleague contends that "regardless of whether the layoff decision is characterized as 'decision' bargaining or 'effects' bargaining, it is subject to the proscriptions of Section 8(a)(5) only if it is a mandatory subject of bargaining" He then directs us back, inter alia, to the plurality opinion in *Otis Elevator*, supra, and maintains that because the layoff was motivated solely by the lawful decision to convert operations and not motivated by a desire to reduce labor costs it was non-mandatory subject of bargaining. This is a unique view of the plurality *Otis Elevator* opinion, which itself indicated that it was addressed to analyzing "Section 8(d) as it impacts upon management decisions, other than partial closings, to change the nature of the enterprise." 269 NLRB at 893. The plurality opinion nowhere indicated that it was also addressed to the *effects* of such management decisions. Indeed the plurality opinion in *Otis* remanded the effects bargaining allegations in that case for further analysis. It did not simply dismiss those allegations as outgrowths of the

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[7] Although the complaint alleges a failure to bargain over the decision to lay off employees, the General Counsel and Charging Party clearly argued effects bargaining in their exceptions and brief in support of exceptions and the Respondent filed a reply brief. The Respondent does not contend that it was not put on notice of the issues presented or that any additional evidence would have been relevant to the effects bargaining issue. Consequently, we find that this pre-*Otis Elevator*, supra, complaint was more than adequate to satisfy due process requirements.

larger nonbargainable decision to transfer work. In fact, not one of the views expressed in *Otis* would apply its analysis to effects bargaining. Member Dennis concurred in remanding the effects bargaining violation, while Member Zimmerman would have allowed the finding of an effects bargaining violation to stand without further hearing. Id. at 895, 901. Here, we find the layoff was an *effect* of the decision to convert and hence was bargainable on that basis. More importantly, we also note that the continuation or termination of employment is certainly a term or condition of employment, *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964), so that the subject matter of the decision at issue here — the layoff of the 10 employees — falls within the limits dictated by Section 8(a)(5) of the Act. It is therefore appropriate to order bargaining over the layoff decision in this case.

Our colleague further charges that our decision ignores the Supreme Court's mandate in *First National Maintenance*, supra, that management's "need for unencumbered decisionmaking" must not be denied by undue bargaining constraints. He thereby ignores other remarks of the Court in *First National Maintenance*. By placing this limit on "decision-bargaining," the Court was not by extension limiting bargaining on the "impact" or effects of such a decision on the employees, as its underscoring of the continued viability of effects bargaining demonstrates. 452 U.S. at 677 fn. 15. Here we are finding the layoff bargainable as an effect of the conversion decision.[8]

[8] A brief description of what bargaining over the layoffs would likely entail may help to clarify our reason for rejecting our dissenting colleague's view that requiring such bargaining impermissibly encumbers the entrepreneurial decision to eliminate jobs for technological reasons. The likely scope of such bargaining is illuminated by the submissions of both the Respondent and the Union in

(continued)

In this case, as in *Morco*, bargaining over the layoffs as an effect of the business decision will not compromise the employer's interest in "unencumbered decision making," *First National Maintenance*, supra at 679, which the Supreme Court in *First National Maintenance* and the Board in *Otis Elevator*, supra, sought to protect. Our dissenting colleague disputes our reliance on *Morco*, but his analysis of the case is in error. In *Morco*,

the respondent transferred work from its plant in Las Pinellas, Florida, to a new plant in Mississippi to facilitate the performance of more sophisticated work by its unionized employees at Las Pinellas. When the contract that was to have generated the more sophisticated work was delayed, the respondent commenced layoffs at

(ftn. continued)
this case.

The Union, in its brief, agrees that it had no right to bargain over the decision to make a technological change that would eliminate certain types of unit work, but it submits that it should have had a right to bargain, for example, over the timing of any attendant layoffs, the order in which employees should be laid off, the possibilities of avoiding the necessity of some or all of the layoffs by retraining senior employees who had performed the eliminated work so that they could take other available jobs, or by going to a short workweek or a system of rotating layoffs that would divide the remaining amount of work among the work force.

The Respondent counters in its brief that the Union had the opportunity to bargain about retraining workers, transferring them to other plants, or changing to a system of rotating layoffs. In fact it now submits that it offered the Union the opportunity to engage in such bargaining when it offered to bargain over the "effects" (but not the decision) to lay employees off. We do not think that the Respondent's offer to bargain about the "effects" of layoffs gave the Union notice that the Respondent was willing to bargain about whether layoffs could be *avoided* through transfer, retraining, or the like. Thus whether or not the Respondent was willing then to engage in the scope of bargaining it now describes is immaterial to our conclusion that the Respondent did not make the offer to bargain that it was required to under our Act.

the Las Pinellas plant and refused to bargain over them. The Board ruled that the respondent had no duty to bargain over the decision to transfer the work but specifically held that it was obligated "to bargain with the Union about the *effects of [the] decision . . . including the layoffs*." 279 NLRB No. 100 slip op. at 4 (emphasis added). Moreover, in addition to its explicit characterization of the layoff as an effect of the decision to transfer work, the Board also expressly adopted the judge's conclusion that the respondent had violated Section 8(a)(5) by refusing to bargain over the "effects (including the layoffs)" of the respondent's decision to transfer work. Id., ALJD slip op. at 14. Thus, the plain language of *Morco* indicates that our colleague is in error in averring that the Board's order in *Morco* goes only to the *effects* of the layoff rather than to the layoff itself as an effect of the decision to transfer work out of the bargaining unit.

In *Drummond Coal Co.*, 277 NLRB 1618 (1986), the Board found that the respondent had no obligation to bargain over its decision to close its central repair shop, transfer the work, and lay of the employees. It does not appear that the legal theory before us here — that the layoff of the Respondent's employees was an effect of a nonbargainable management decision and thus was subject to an effects bargaining obligation — was before the Board in *Drummond*. In this case, the General Counsel conceded that the business decision resulting in the layoff was nonbargainable and sought to have the layoff considered separately as an *effect* of that nonbargainable decision. On examination of this issue, we find that the approach urged by the General Counsel in *Morco* is a better treatment of the issue of the Respondent's obligation to bargain over the layoffs that resulted from its decision to convert its plant's operations.

We further find no merit in the Respondent's contention, which the judge found it unnecessary to reach, that the Union waived its right to bargaining over the layoff, whether by failing to request bargaining, by contractual waiver, or by prior practice. The record shows that the Union repeatedly requested bargaining over the layoff decision and that the Respondent refused to bargain over it. Nothing in the collective-bargaining agreement expressly waives the Union's right to bargain over the layoff decision, and the provision for notice to the Union of contemplated layoff does not provide a basis for an implied waiver. Section 12(a) of the collective-bargaining agreement provides, in part: "[w]henever an Employer intends to lay off all or part of his employees, he shall give notice of such intention not later than quitting time of the previous working day." It is clear that this provision, although requiring notice of a decision to lay off, is silent as to the Union's right to bargain over such a decision. We also reject, as did the judge, the Respondent's contention that Business Agent Major's interpretation of the meaning of this provision is an admission. As Major had no knowledge what the parties intended by the provision, her testimony about its meaning is mere opinion. Finally, the record does not establish that the Respondent previously laid off employees without consulting or bargaining with the Union, or that the Union acquiesced in such acts.

Remedy

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to take certain affirmative action, and to post the appropriate notice. We shall remedy the Respondent's unilateral abandonment of its grievance procedure by ordering it to process the grievances through its

contractual grievance procedure. In accord with our analysis in *Indiana & Michigan Electric*, supra, slip op. at 20-22, however, we will remedy a repudiation of the contractual commitment to arbitrate by ordering arbitration of the grievances only when the grievances at issue "arise under" the expired contract. *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).

The grievances at hand rely on the contractual provisions governing the order of layoff. As in *Indiana & Michigan Electric*, we conclude that the right invoked by the grievances does not "arise under" the expired contract under *Nolde*. The conduct that triggered the grievances — the layoff of the 10 employees — occurred after the contract had expired. The right to layoff by seniority if other factors such as ability and experience are equal is not "a right worked for or accumulated over time." *Indiana & Michigan*, supra, slip op. at 23. And, as in *Indiana & Michigan Electric*, there is no indication here that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." Id. (citation omitted). Therefore, the Respondent had no contractual obligation to arbitrate the grievances and we shall not order the arbitration of the grievances.[9]

Having found that the Respondent, by failing to bargain with the Union over the 31 August and 2 September layoffs as effects of its decision to convert its Santa Clara, California plant to an exclusively hot-type operation, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall accompany our order to bargain with a limited

[9] Whether the conduct grieved in the layoff grievances constituted an unlawful unilateral change in terms and conditions of employment is not before us. The manner of the layoff was not alleged as a unilateral change.

backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so in this case by requiring the Respondent to pay backpay to its employees in a manner analogous to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), and *Interstate Tool Co.*, 177 NLRB 686 (1969). Thus, the Respondent shall pay all affected employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the layoffs of 31 August and September 1980 as effects of the plant conversion on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision and Order or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from the dates on which he was laid off or terminated to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

ORDER

The National Labor Relations Board orders that the Respondent, Litton Financial Printing Division, a Division of Litton Business Systems, Inc., Santa Clara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Without prior notice to or consultation with Printing Specialties and Paper Products Union, District Council No. 1, International Printing and Graphic Communications Union, as the exclusive collective-bargaining representative of the employees in the appropriate unit, dealing directly with the employees by granting severance pay benefits to employees who have been laid off.

(b) Refusing to bargain collectively, within the meaning of the Act, with the Union by unilaterally repudiating the arbitration provisions of the parties' 1974-1977 collective-bargaining agreement (the 1974-1977 Agreement) after the agreement expired.

(c) Refusing to bargain collectively with the Union by unilaterally abandoning the grievance procedure in the 1974-1977 Agreement after the agreement expired.

(d) Refusing to bargain collectively, within the meaning of the Act, with the Union over its layoffs of 31 August and 2 September 1980 as effects on its employees in the unit of its decision to convert its Santa Clara plant to a hot-type plant.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, process the 10 layoff grievances filed by the Union about 5 September 1980 pursuant to the grievance procedure established in the 1974-1977 Agreement.

(b) On the Union's request, bargain with it over its layoffs of 31 August and 2 September 1980 as effects on its employees in the unit of the decision to convert the Santa Clara, California plant to a hot-type plant.

(c) Pay the laid-off employees their normal wages for the period set forth in the remedy portion of the Decision and Order.

(d) Post at its facility in Santa Clara, California, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[10] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. 6 November 1987

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting.

I dissent from my colleagues' finding that the Respondent violated Section 8(a)(5) and (1) of the Act by abandoning the arbitration procedure of the expired contract and by refusing to bargin with the Union over the "effects" of its decision to convert the plant's machinery.

The facts are not in dispute. Briefly stated, the Union has represented the Respondent's production and maintenance employees since 1974, and the Respondent and the Union were parties to successive collective-bargaining agreements, the last of which expired on 5 October 1979. In July 1980 the Respondent decided to discontinue its cold-type printing process at its Santa Clara plant and convert a strictly hot-type process. As a result, the Respondent transferred its cold-type work to other plants, sold its cold-type equipment, and laid off 10 employees. Of these 10 employees, 7 had worked exclusively on the cold-type equipment and 3 had worked primarily on it. The Respondent failed to give the Union notice of the layoffs, nor did it choose the employees for layoff in accord with seniority.[1]

The Union filed grievances on behalf of each of the laid-off employees alleging "unjust layoff, out of seniority," and the Respondent refused to accept them. On 24 September Union Business Agent Marilyn Major sent the Respondent's plant manager, Mary Arnold, a

[1] The expired contract contained a provision which stated:

> Whenever an Employer intends to layoff all or part of his employees, he shall give notice of such intention not later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

letter requesting "that the Company meet with our representatives to discuss this layoff and its impact on these senior people." By letter dated 3 November, the Respondent's attorney responded:

> In going through some old mail today, I came across your letter of September 24 and read it again. It appears to me to be ambiguous. When I first replied to it on October 3, I viewed it as a request to utilize the grievance-arbitration provisions of the expired contract.
>
> Upon reading it again, I can see where you might have also been requesting a meeting to discuss the effects of the layoffs mentioned in your letter. If that was your intent, I have no objection to such a meeting. Please call me if you wanted to arrange such a discussion.

It is undisputed that the Respondent continued to refuse to bargain over the layoff decision but expressed willingness to bargain over the effects of that decision; that the Union never requested to meet with the Respondent to discuss the effects of the layoff decision; and that the Respondent refused to process the 10 layoff grievances.

My colleagues conclude on these facts that the Respondent's conduct "amounted to a wholesale repudiation of its contractual obligation to arbitrate," citing *Indiana & Michigan Electric Co.*, 284 NLRB No. 7, slip op. at 20 (May 29, 1987). I disagree. Although I joined my colleagues in that portion of the decision cited, the facts on which we based our finding of a wholesale repudiation of the arbitration provisions are far different from those in the present case. In *Indiana*

& Michigan, slip op. at 19-20, as Members Babson and Stephens stated:

> [T]he Respondent took the position that upon contract expiration it was no longer bound by the arbitration provisions. The Respondent followed through or its initial declaration that it would not apply the arbitration provisions during the contractual hiatus by routinely refusing to arbitrate any hiatus grievance. It expressly grounded its refusal to arbitrate in each case on its general intention not to arbitrate any grievances arising while the parties were without a contract. The Respondent did not limit its refusal to arbitrate to a particular grievance or class of grievances.

Such is not the case here. All the record indicates is that the Union presented 10 grievances to the Respondent, all of which arose outside the expired contract, and the Respondent refused to process them. The Union never mentioned the issue of arbitrating these or any other grievances, and the Respondent, unlike in *Indiana & Michigan*, never expressly or implicitly rejected the idea of arbitrating any grievances, except possibly the 10 grievances involved here, which my colleagues agree the Respondent was under no duty to arbitrate. Under these circumstances, I find the evidence insufficient to establish a "wholesale repudiation" of the arbitration procedure.[2] See *Dallas Morning News*, 285 NLRB No.

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[2] My colleagues base their finding of wholesale repudiation on the Respondent's 3 November letter to the Union and its admission at the hearing that it failed and refused to process the 10 grievances "pursuant to the grievance-arbitration procedure in the expired

(continued)

106 (Sept. 16, 1987). Further, for the reasons stated in my partial dissent in *Indiana & Michigan*, I would hold that the postexpiration duty to follow the contractual grievance procedure exists only to the extent of the duty to arbitrate grievances "arising under" the contract. As these grievances did not "arise under" the contract, I would find that the Respondent had no obligation so to process them. Accordingly, I would dismiss these complaint allegations.

My colleagues also find that the Respondent had an obligation to bargain with the Union over its decision to lay off the 10 cold-type employees. They achieve this result by characterizing the layoff as an "effect" of the decision to convert from cold-type to hot-type printing and, as such, encompassed within the Respondent's bargaining obligation.

I take no issue with my colleagues over the well-settled proposition that an employer must engage in effects bargaining. What I do take issue with them is that, under all the circumstances presented in this case, the layoff may not properly be classified as an effect of the conversion decision. The General Counsel did not allege, nor do my colleagues find, that the Respondent had any obligation to bargain with the Union over its decision to convert from cold-type to hot-type printing.[3] Nevertheless, the General Counsel and my colleagues view the layoff decision as a separate and distinct decision from the conversion decision, thereby triggering the Respondent's obligation to bargain.

(ftn. continued)
contract." Contrary to my colleagues' assertion, these two pieces of evidence establish only that the Respondent refused to process these grievances, not an across-the-board refusal to arbitrate the post-expiration disputes.

[3] Under *Otis Elevator*, 269 NLRB 891 (1984), the Respondent's conversion decision is clearly a nonmandatory subject of bargaining.

Such a distinction is strained in light of the facts of this case. Once the Respondent decided to convert from cold-type to hot-type printing, it laid off the 10 employees involved exclusively or primarily with the cold-type process. Thus, the Respondent's layoff decision was totally dependent on and a natural result of its conversion decision or, as the judge found, the layoff decision was "inextricably intertwined" with the conversion decision. Once the General Counsel in effect conceded that the Respondent could lawfully implement the conversion decision without bargaining with the Union, it follows that the Respondent could lawfully lay off the cold-type employees — the natural and logical method of implementation of its conversion decision.

Even assuming, however, that my colleagues are correct in stating that "the Respondent's decision to lay off employees is not so inextricably intertwined with the conversion decision to render impossible bargaining over the layoff decision, as distinct from the conversion decision, as the judge believed it would be," their refusal to analyze the layoff decision under *Otis Elevator* is erroneous.

It is axiomatic that an employer's duty to bargain encompasses only mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Regardless of whether the layoff decision is characterized as "decision" bargaining or "effects" bargaining, it is subject to the proscriptions of Section 8(a)(5) only if it is a mandatory subject of bargaining. Thus, as a prerequisite to any order that the Respondent must bargain with the Union over the layoff decision, my colleagues must find the layoff decision to be a mandatory subject of bargaining.

This they cannot do. Under the opinion of former Member Hunter and me in *Otis Elevator*, the layoff

decision, motivated solely by the Respondent's decision to implement its lawful conversion decision and not by labor cost reasons, is a nonmandatory subject of bargaining. No different result would be reached under the opinions of former Members Zimmerman and Dennis as the decision was not amenable to resolution through bargaining.[4]

Because the meaning of my colleagues' order is far from certain in this case, they may contend that the Respondent is required to bargain only over the effects of its layoff decision. Yet under the facts of this case, my colleagues are precluded from entering such an order. The General Counsel did not allege that the Respondent failed to bargain over the effects of the layoff decision. Nor could one be sustained in light of the Respondent's stated willingness to engage in effects bargaining, and the Union's failure to respond to such offers.

The effects of my colleagues' decision in this case is to order the Respondent to bargain over a subject that it has no legal obligation to do. My colleagues have not expounded a legal basis for their decision nor, in my opinion, is it possible to do so.[5] As the Supreme Court

[4] My colleagues contend that *Otis Elevator* is irrelevant here because *Otis* does not apply to effects bargaining. As I explained above, in my opinion the layoff decision here cannot be classified merely as an effect of the conversion decision but rather must be analyzed, like other management decisions, under the framework set out in *Otis*.

[5] In support of their finding, my colleagues rely on *Morco Industries*, 279 NLRB No. 100 (Apr. 30, 1986), a case in which I participated. In my opinion, the Board in that case ordered the respondent to bargain only about the effects of the layoff which resulted from the lawful transfer decision, not the layoff decision itself. This interpretation is consistent with the remedy given in that case as well as with the Board's decision in *Drummond Coal Co.*,

(continued)

recognized in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), certain management decisions may result in the loss of jobs and yet be outside the bargaining obligation. Indeed, as the Court stated in *First National Maintenance*, 452 U.S. at 678-679:

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. [Footnotes omitted.]

My colleagues have ignored these dictates. To require the Respondent to bargain over the layoff, which was part and parcel of its decision to convert its machinery, would severely undermine the Respondent's "need for unencumbered decisionmaking." This is true

(ftn. continued)
277 NLRB 1618 (1986), in which I also participated, where the Board found no obligation to bargain over the decision to lay off employees as a result of its lawful decision to transfer repair services and close the Jasper shop and deferred the issue of effects bargaining over the layoffs to an arbitral award.

regardless of whether the layoff is considered as an "effect" of the conversion decision or a decision to be viewed separately from the conversion decision.

For these reasons, I dissent.

Dated, Washington, D.C. 6 November 1987

Donald L. Dotson, Chairman

NATIONAL LABOR
RELATIONS BOARD

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner-Intervenor, v. LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., Respondent.	No. 88-7065 NLRB No. 32-CA-3160

PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 88-7079 NLRB No. 32-CA-3160 JUDGMENT

Upon Application For Enforcement of an Order
of the National Labor Relations Board

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the application for enforcement of the order of the National Labor Relations Board in this Cause be, and hereby is AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Filed and entered: January 16, 1990

A TRUE COPY
ATTEST JUL 13 1990
CATHY A. CATTERSON
Clerk of Court
by: /s/ Christine Hill
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1,
Petitioner-Intervenor,
v.
LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
Respondent.

No. 88-7065
NLRB No. 32-CA-3160

PRINTING SPECIALTIES DISTRICT COUNCIL NUMBER 2, as successor to Printing Specialties District Council Number 1,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 88-7079
NLRB No. 32-CA-3160

ORDER

Before: FARRIS, BOOCHEVER, and HALL,
Circuit Judges

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.),

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.